

ESSB 6272 - H AMD 902

By Representative Condotta

WITHDRAWN 03/06/2014

1 On page 10, beginning on line 34, strike all of section 7 and
2 insert the following:

3
4 "Sec. 7. RCW 46.96.185 and 2010 c 178 s 6 are each amended to
5 read as follows:

6 (1) Notwithstanding the terms of a franchise agreement, a
7 manufacturer, distributor, factory branch, or factory representative,
8 or an agent, officer, parent company, wholly or partially owned
9 subsidiary, affiliated entity, or other person controlled by or under
10 common control with a manufacturer, distributor, factory branch, or
11 factory representative, shall not:

12 (a) Discriminate between new motor vehicle dealers by selling or
13 offering to sell a like vehicle to one dealer at a lower actual price
14 than the actual price offered to another dealer for the same model
15 similarly equipped;

16 (b) Discriminate between new motor vehicle dealers by selling or
17 offering to sell parts or accessories to one dealer at a lower actual
18 price than the actual price offered to another dealer;

19 (c) Discriminate between new motor vehicle dealers by using a
20 promotion plan, marketing plan, or other similar device that results
21 in a lower actual price on vehicles, parts, or accessories being
22 charged to one dealer over another dealer;

23 (d) Discriminate between new motor vehicle dealers by adopting a
24 method, or changing an existing method, for the allocation,
25 scheduling, or delivery of new motor vehicles, parts, or accessories
26 to its dealers that is not fair, reasonable, and equitable. Upon the
27 request of a dealer, a manufacturer, distributor, factory branch, or

1 factory representative shall disclose in writing to the dealer the
2 method by which new motor vehicles, parts, and accessories are
3 allocated, scheduled, or delivered to its dealers handling the same
4 line or make of vehicles;

5 (e) Discriminate against a new motor vehicle dealer by preventing,
6 offsetting, or otherwise impairing the dealer's right to request a
7 documentary service fee on affinity or similar program purchases.
8 This prohibition applies to, but is not limited to, any promotion
9 plan, marketing plan, manufacturer or dealer employee or employee
10 friends or family purchase programs, or similar plans or programs;

11 (f) Give preferential treatment to some new motor vehicle dealers
12 over others by refusing or failing to deliver, in reasonable
13 quantities and within a reasonable time after receipt of an order, to
14 a dealer holding a franchise for a line or make of motor vehicles sold
15 or distributed by the manufacturer, distributor, factory branch, or
16 factory representative, a new vehicle, parts, or accessories, if the
17 vehicle, parts, or accessories are being delivered to other dealers,
18 or require a dealer to purchase unreasonable advertising displays or
19 other materials, or unreasonably require a dealer to remodel or
20 renovate existing facilities as a prerequisite to receiving a model or
21 series of vehicles;

22 (g) Compete with a new motor vehicle dealer of any make or line by
23 acting in the capacity of a new motor vehicle dealer, or by owning,
24 operating, or controlling, whether directly or indirectly, a motor
25 vehicle dealership in this state. It is not, however, a violation of
26 this subsection for:

27 (i) A manufacturer, distributor, factory branch, or factory
28 representative to own or operate a dealership for a temporary period,
29 not to exceed two years, during the transition from one owner of the
30 dealership to another where the dealership was previously owned by a
31 franchised dealer and is currently for sale to any qualified
32 independent person at a fair and reasonable price. The temporary
33 operation may be extended for one twelve-month period on petition of
34 the temporary operator to the department. The matter will be handled

1 as an adjudicative proceeding under chapter 34.05 RCW. A dealer who
2 is a franchisee of the petitioning manufacturer or distributor may
3 intervene and participate in a proceeding under this subsection
4 (1)(g)(i). The temporary operator has the burden of proof to show
5 justification for the extension and a good faith effort to sell the
6 dealership to an independent person at a fair and reasonable price;

7 (ii) A manufacturer, distributor, factory branch, or factory
8 representative to own or operate a dealership in conjunction with an
9 independent person in a bona fide business relationship for the
10 purpose of broadening the diversity of its dealer body and enhancing
11 opportunities for qualified persons who are part of a group who have
12 historically been underrepresented in its dealer body, or other
13 qualified persons who lack the resources to purchase a dealership
14 outright, and where the independent person: (A) Has made, or within a
15 period of two years from the date of commencement of operation will
16 have made, a significant, bona fide capital investment in the
17 dealership that is subject to loss; (B) has an ownership interest in
18 the dealership; and (C) operates the dealership under a bona fide
19 written agreement with the manufacturer, distributor, factory branch,
20 or factory representative under which he or she will acquire all of
21 the ownership interest in the dealership within a reasonable period of
22 time and under reasonable terms and conditions. The manufacturer,
23 distributor, factory branch, or factory representative has the burden
24 of proof of establishing that the acquisition of the dealership by the
25 independent person was made within a reasonable period of time and
26 under reasonable terms and conditions. Nothing in this subsection
27 (1)(g)(ii) relieves a manufacturer, distributor, factory branch, or
28 factory representative from complying with (a) through (f) of this
29 subsection;

30 (iii) A manufacturer, distributor, factory branch, or factory
31 representative to own or operate a dealership in conjunction with an
32 independent person in a bona fide business relationship where the
33 independent person: (A) Has made, or within a period of two years
34 from the date of commencement of operation will have made, a

1 significant, bona fide capital investment in the dealership that is
2 subject to loss; (B) has an ownership interest in the dealership; and
3 (C) operates the dealership under a bona fide written agreement with
4 the manufacturer, distributor, factory branch, or factory
5 representative under which he or she will acquire all of the ownership
6 interest in the dealership within a reasonable period of time and
7 under reasonable terms and conditions. The manufacturer, distributor,
8 factory branch, or factory representative has the burden of proof of
9 establishing that the acquisition of the dealership by the independent
10 person was made within a reasonable period of time and under
11 reasonable terms and conditions. The number of dealerships operated
12 under this subsection (1)(g)(iii) may not exceed four percent rounded
13 up to the nearest whole number of a manufacturer's total of new motor
14 vehicle dealer franchises in this state. Nothing in this subsection
15 (1)(g)(iii) relieves a manufacturer, distributor, factory branch, or
16 factory representative from complying with (a) through (f) of this
17 subsection;

18 (iv) A truck manufacturer to own, operate, or control a new motor
19 vehicle dealership that sells only trucks of that manufacturer's line
20 make with a gross vehicle weight rating of 12,500 pounds or more, and
21 the truck manufacturer has been continuously engaged in the retail
22 sale of the trucks at least since January 1, 1993; (~~(e)~~)

23 (v) A manufacturer to own, operate, or control a new motor vehicle
24 dealership trading exclusively in a single line make of the
25 manufacturer if (A) the manufacturer does not own, directly or
26 indirectly, in the aggregate, in excess of forty-five percent of the
27 total ownership interest in the dealership, (B) at the time the
28 manufacturer first acquires ownership or assumes operation or control
29 of any such dealership, the distance between any dealership thus
30 owned, operated, or controlled and the nearest new motor vehicle
31 dealership trading in the same line make of vehicle and in which the
32 manufacturer has no ownership or control is not less than fifteen
33 miles and complies with the applicable provisions in the relevant
34 market area sections of this chapter, (C) all of the manufacturer's

1 franchise agreements confer rights on the dealer of that line make to
2 develop and operate within a defined geographic territory or area, as
3 many dealership facilities as the dealer and the manufacturer agree
4 are appropriate, and (D) as of January 1, 2000, the manufacturer had
5 no more than four new motor vehicle dealers of that manufacturer's
6 line make in this state, and at least half of those dealers owned and
7 operated two or more dealership facilities in the geographic territory
8 or area covered by their franchise agreements with the manufacturer;

9 (vi) A final-stage manufacturer to own, operate, or control a new
10 motor vehicle dealership; or

11 (vii) A manufacturer to: (A) Own, operate, or control a new motor
12 vehicle dealership that sells new vehicles that are only of that
13 manufacturer's makes or lines, where no make or line of the
14 manufacturer is sold new by a licensed independent franchise dealer;
15 or (B) Own, operate, or control or contract with companies that
16 provide finance, leasing, or service for vehicles that are of that
17 manufacturer's makes or lines if the manufacturer owns, operates or
18 controls a new motor vehicle dealership pursuant to (A) of this
19 subsection;

20 (h) Compete with a new motor vehicle dealer by owning, operating,
21 or controlling, whether directly or indirectly, a service facility in
22 this state for the repair or maintenance of motor vehicles under the
23 manufacturer's new car warranty and extended warranty. Nothing in
24 this subsection (1)(h), however, prohibits a manufacturer,
25 distributor, factory branch, or factory representative from owning or
26 operating a service facility for the purpose of providing or
27 performing maintenance, repair, or service work on motor vehicles that
28 are owned by the manufacturer, distributor, factory branch, or factory
29 representative;

30 (i) Use confidential or proprietary information obtained from a
31 new motor vehicle dealer to unfairly compete with the dealer. For
32 purposes of this subsection (1)(i), "confidential or proprietary
33 information" means trade secrets as defined in RCW 19.108.010,
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1 business plans, marketing plans or strategies, customer lists,
2 contracts, sales data, revenues, or other financial information;

3 (j)(i) Terminate, cancel, or fail to renew a franchise with a new
4 motor vehicle dealer based upon any of the following events, which do
5 not constitute good cause for termination, cancellation, or nonrenewal
6 under RCW 46.96.060: (A) The fact that the new motor vehicle dealer
7 owns, has an investment in, participates in the management of, or
8 holds a franchise agreement for the sale or service of another make or
9 line of new motor vehicles; (B) the fact that the new motor vehicle
10 dealer has established another make or line of new motor vehicles or
11 service in the same dealership facilities as those of the manufacturer
12 or distributor; (C) that the new motor vehicle dealer has or intends
13 to relocate the manufacturer or distributor's make or line of new
14 motor vehicles or service to an existing dealership facility that is
15 within the relevant market area, as defined in RCW 46.96.140, of the
16 make or line to be relocated, except that, in any nonemergency
17 circumstance, the dealer must give the manufacturer or distributor at
18 least sixty days' notice of his or her intent to relocate and the
19 relocation must comply with RCW 46.96.140 and 46.96.150 for any same
20 make or line facility; or (D) the failure of a franchisee to change
21 the location of the dealership or to make substantial alterations to
22 the use or number of franchises on the dealership premises or
23 facilities.

24 (ii) Notwithstanding the limitations of this section, a
25 manufacturer may, for separate consideration, enter into a written
26 contract with a dealer to exclusively sell and service a single make
27 or line of new motor vehicles at a specific facility for a defined
28 period of time. The penalty for breach of the contract must not
29 exceed the amount of consideration paid by the manufacturer plus a
30 reasonable rate of interest;

31 (k) Coerce or attempt to coerce a motor vehicle dealer to refrain
32 from, or prohibit or attempt to prohibit a new motor vehicle dealer
33 from acquiring, owning, having an investment in, participating in the
34 management of, or holding a franchise agreement for the sale or

1 service of another make or line of new motor vehicles or related
2 products, or establishing another make or line of new motor vehicles
3 or service in the same dealership facilities, if the prohibition
4 against acquiring, owning, investing, managing, or holding a franchise
5 for such additional make or line of vehicles or products, or
6 establishing another make or line of new motor vehicles or service in
7 the same dealership facilities, is not supported by reasonable
8 business considerations. The burden of proving that reasonable
9 business considerations support or justify the prohibition against the
10 additional make or line of new motor vehicles or products or
11 nonexclusive facilities is on the manufacturer;

12 (1) Require, by contract or otherwise, a new motor vehicle dealer
13 to make a material alteration, expansion, or addition to any
14 dealership facility, unless the required alteration, expansion, or
15 addition is uniformly required of other similarly situated new motor
16 vehicle dealers of the same make or line of vehicles and is reasonable
17 in light of all existing circumstances, including economic conditions.
18 In any proceeding in which a required facility alteration, expansion,
19 or addition is an issue, the manufacturer or distributor has the
20 burden of proof. Except for a program or any renewal or modification
21 of a program that is in effect with one or more new motor vehicle
22 dealers in this state on the effective date of this section, a
23 manufacturer shall not require, coerce, or attempt to coerce any new
24 motor vehicle dealer by program, policy, standard, or otherwise to
25 change the location of the dealership or construct, replace, renovate,
26 or make any substantial changes, alterations, or remodeling to a new
27 motor vehicle dealer's sales or service facilities, except as
28 necessary to comply with health or safety laws or to comply with
29 technology requirements without which a dealer would be unable to
30 service a vehicle the dealer has elected to sell, before the tenth
31 anniversary of the date of issuance of the certificate of occupancy or
32 the manufacturer's approval, whichever is later, from:

33 (i) The date construction of the dealership at that location was
34 completed if the construction was in substantial compliance with

1 standards or plans provided by a manufacturer, distributor, or
2 representative or through a subsidiary or agent of the manufacturer,
3 distributor, or representative; or

4 (ii) The date a prior change, alteration, or remodel of the
5 dealership at that location was completed if the construction was in
6 substantial compliance with standards or plans provided by a
7 manufacturer, distributor, or representative or through a subsidiary
8 or agent of the manufacturer, distributor, or representative;

9 (m) Prevent or attempt to prevent by contract or otherwise any new
10 motor vehicle dealer from changing the executive management of a new
11 motor vehicle dealer unless the manufacturer or distributor, having
12 the burden of proof, can show that a proposed change of executive
13 management will result in executive management by a person or persons
14 who are not of good moral character or who do not meet reasonable,
15 preexisting, and equitably applied standards of the manufacturer or
16 distributor. If a manufacturer or distributor rejects a proposed
17 change in the executive management, the manufacturer or distributor
18 shall give written notice of its reasons to the dealer within sixty
19 days after receiving written notice from the dealer of the proposed
20 change and all related information reasonably requested by the
21 manufacturer or distributor, or the change in executive management
22 must be considered approved; ((~~or~~))

23 (n) Condition the sale, transfer, relocation, or renewal of a
24 franchise agreement or condition manufacturer, distributor, factory
25 branch, or factory representative sales, services, or parts incentives
26 upon the manufacturer obtaining site control, including rights to
27 purchase or lease the dealer's facility, or an agreement to make
28 improvements or substantial renovations to a facility. For purposes
29 of this section, a substantial renovation has a gross cost to the
30 dealer in excess of five thousand dollars;

31 (o) Fail to provide to a new motor vehicle dealer purchasing or
32 leasing building materials or other facility improvements the right to
33 purchase or lease franchisor image elements of like kind and quality
34 from an alternative vendor selected by the dealer if the goods or

1 services are to be supplied by a vendor selected, identified, or
2 designated by the manufacturer or distributor. If the vendor selected
3 by the manufacturer or distributor is the only available vendor of
4 like kind and quality materials, the new motor vehicle dealer must be
5 given the opportunity to purchase the franchisor image elements at a
6 price substantially similar to the capitalized lease costs of the
7 elements. This subsection (1)(o) must not be construed to allow a new
8 motor vehicle dealer or vendor to gain additional intellectual
9 property rights they are not otherwise entitled to or to impair or
10 eliminate the intellectual property rights of the manufacturer or
11 distributor or to permit a new motor vehicle dealer to erect or
12 maintain signs that do not conform to the reasonable intellectual
13 property usage guidelines of the manufacturer or distributor;

14 (p) Take any adverse action against a new motor vehicle dealer
15 including, but not limited to, charge backs or reducing vehicle
16 allocations, for sales and service performance within a designated
17 area of primary responsibility unless that area is reasonable in light
18 of proximity to relevant census tracts to the dealership and competing
19 dealerships, highways and road networks, state borders, any natural or
20 man-made barriers, demographics, including economic factors, and buyer
21 behavior information; or

22 (q) Require, coerce, or attempt to coerce any new motor vehicle
23 dealer by program, policy, facility guide, standard, or otherwise to
24 order or accept delivery of any service or repair appliances,
25 equipment, parts, or accessories, or any other commodity not required
26 by law, which the dealer has not voluntarily ordered or which the
27 dealer does not have the right to return unused for a full refund
28 within ninety days or a longer period as mutually agreed upon by the
29 dealer and manufacturer.

30 (2) Subsection (1)(a), (b), and (c) of this section do not apply
31 to sales to a motor vehicle dealer: (a) For resale to a federal,
32 state, or local government agency; (b) where the vehicles will be sold
33 or donated for use in a program of driver's education; (c) where the
34 sale is made under a manufacturer's bona fide promotional program

1 offering sales incentives or rebates; (d) where the sale of parts or
2 accessories is under a manufacturer's bona fide quantity discount
3 program; or (e) where the sale is made under a manufacturer's bona
4 fide fleet vehicle discount program. For purposes of this subsection,
5 "fleet" means a group of fifteen or more new motor vehicles purchased
6 or leased by a dealer at one time under a single purchase or lease
7 agreement for use as part of a fleet, and where the dealer has been
8 assigned a fleet identifier code by the department of licensing.

9 (3) The following definitions apply to this section:

10 (a) "Actual price" means the price to be paid by the dealer less
11 any incentive paid by the manufacturer, distributor, factory branch,
12 or factory representative, whether paid to the dealer or the ultimate
13 purchaser of the vehicle.

14 (b) "Control" or "controlling" means (i) the possession of, title
15 to, or control of ten percent or more of the voting equity interest in
16 a person, whether directly or indirectly through a fiduciary, agent,
17 or other intermediary, or (ii) the possession, direct or indirect, of
18 the power to direct or cause the direction of the management or
19 policies of a person, whether through the ownership of voting
20 securities, through director control, by contract, or otherwise,
21 except as expressly provided under the franchise agreement.

22 (c) "Motor vehicles" does not include trucks that are 14,001
23 pounds gross vehicle weight and above or recreational vehicles as
24 defined in RCW 43.22.335.

25 (d) "Operate" means to manage a dealership, whether directly or
26 indirectly.

27 (e) "Own" or "ownership" means to hold the beneficial ownership of
28 one percent or more of any class of equity interest in a dealership,
29 whether the interest is that of a shareholder, partner, limited
30 liability company member, or otherwise. To hold an ownership interest
31 means to have possession of, title to, or control of the ownership
32 interest, whether directly or indirectly through a fiduciary, agent,
33 or other intermediary.

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1 (4) A violation of this section is deemed to affect the public
2 interest and constitutes an unlawful and unfair practice under chapter
3 19.86 RCW. A person aggrieved by an alleged violation of this section
4 may petition the department to have the matter handled as an
5 adjudicative proceeding under chapter 34.05 RCW."

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EFFECT: (1) Allows a manufacturer to own, operate, or control a new motor vehicle dealership in cases where there is no new motor vehicle franchise that sells any make or line of the manufacturer and the manufacturer only sells new vehicles that are of its own make or line.

(2) Allows a manufacturer, who sells its own make or line of vehicle, to own, operate, or control or contract with companies that provide finance, leasing, or service for vehicles made by the manufacturer.

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